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# **Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?**

*February 2010*

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ISBN 978-92-9079-975-7

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# TOWARDS COMMON STANDARDS ON RIGHTS OF SUSPECTED AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS IN THE EU?

*CEPS 'LIBERTY AND SECURITY IN EUROPE'/FEBRUARY 2010*

MAR JIMENO-BULNES\*

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## 1. Introduction

The Swedish Presidency of the EU presented in July 2009 a new Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings in the Union. The Roadmap set out its vision to foster the right to a fair trial in criminal proceedings across the EU.<sup>1</sup> The same Presidency also presented a Draft Resolution on 31 July 2009 outlining the grounds and content of the Roadmap,<sup>2</sup> which was adopted by the Council on the 30 November 2009.<sup>3</sup> Its aim was to invite the European Commission to submit new legislative proposals covering the measures included in the Roadmap, and in this way overcome the obstacles encountered by a previous Commission initiative of 2004 on certain procedural rights in criminal proceedings throughout the EU.<sup>4</sup> In light of the importance of this topic for the protection of the rights of suspected and accused individuals in a European Area of Justice, numerous civil society organisations and other relevant actors have reacted.<sup>5</sup>

At the time of writing, European Council Conclusions of 10/11 December 2009, which incorporated a fundamental contribution to the development of the EU's Area of Freedom,

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<sup>1</sup> Presidency of the Council of the EU, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, Brussels, 1 July 2009, document No. 11457/09, DROIPEN 53, COPEN 120. Search of this document as any other from the Council of EU can be done at official website <http://register.consilium.europa.eu>.

<sup>2</sup> Presidency of the Council of the EU, Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Brussels, 31 July 2009, document No. 12531/09, DROIPEN 78, COPEN 150.

<sup>3</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Official Journal C 295, 4 December 2009, pp.1-3 according to version presented on 24 November 2009, document No. 15434/09, DROIPEN 149, COPEN 220, being appreciated only two slight differences from mentioned draft and afterwards commented.

<sup>4</sup> Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328, 28 April 2004,

<sup>5</sup> Position statement on Procedural Rights and Safeguards in Criminal Proceedings by International Commission of Jurists (ICJ) and JUSTICE as well as Joint Position on Procedural Safeguards by same institutions besides Fair Trials International and Irish Council for Civil Liberties, both of them redacted in July 2009 (<http://www.amnesty-eu.org>); last one contained the claim for the incorporation of the roadmap on procedural rights into the Stockholm Programme, which at that time was still silent on the topic.

Security and Justice (AFSJ), were just published.<sup>6</sup> The Conclusions included the so-called Stockholm Programme, which foresees the policy priorities that will guide the EU's AFSJ for the years 2010-14. In particular, the European Council considered as *a challenge* "to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security in Europe" and identified as a priority "that law enforcement measures ... to safeguard individual rights" in order to create a real and tangible AFSJ as "single area in which fundamental rights are protected".<sup>7</sup> It is now time to see the ways in which this *challenge* is going to materialise in practice in the context of the future Action Plan implementing this Stockholm Programme which is expected to be presented by the Commission and adopted 'at the latest in June 2010' under the auspices of the Spanish Presidency of the EU.<sup>8</sup>

This paper starts by making a short exposition of the general policy framework within which we need to understand the Council's Roadmap on the promotion of procedural guarantees in criminal proceedings and its connection with the Stockholm Programme; reference is also made to former proposals in this policy area. Second, it provides an analysis of the proposed measures contained inside the Roadmap.<sup>9</sup> We review what has been proposed and address its compatibility with what should have been included according to existing European standards; here special mention is made to the European Convention of Human Rights (ECHR) and the jurisprudence of the European Court on Human Rights (ECtHR). Third, the paper offers some critical reflections addressing the provisions encapsulated by the proposed Roadmap. Finally, we put forward a set of policy recommendations aiming at improving a future common legislative framework on procedural rights in the EU.

## 2. Setting the Policy Context: The Protection of Rights of Suspects and Accused Persons in Criminal Proceedings

In its Communication on An Area of Freedom, Security and Justice serving the Citizen of 10 June 2009<sup>10</sup> the Commission recognised the lack of any regulation concerning procedural rights in criminal proceedings at EU level, and called for a major effort on this issue. The Communication included no reference to the Roadmap which later on originated from the Swedish Presidency.<sup>11</sup> Among its proposals for the next multi-annual programme on an AFSJ – the Stockholm Programme – the Commission suggested to "make the benefit of the area of freedom, security and justice more tangible to the ordinary citizen".<sup>12</sup> The Commission identified as one of the main policy priorities the promotion of citizens' rights in order to create

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<sup>6</sup> European Council (2009), Presidency Conclusions of the Brussels European Council, 10-11 December 2009, EUCO 6/09 available on official website of European Council (<http://www.consilium.europa.eu>, menu European Council, European Council Meetings, Presidency Conclusions).

<sup>7</sup> Ibid., points 26 and 27.

<sup>8</sup> Ibid., point 33.

<sup>9</sup> Our analysis uses the definitive text published in Official Journal. This text comes from version agreed at the Council of EU on 24 November 2009, Document No. 15434/09.

<sup>10</sup> European Commission (2009), Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM (2009) 262 final, Brussels, 10.6.2009.

<sup>11</sup> First reference under the title "rights of the individual in criminal proceedings" is done in Presidency of the Council of the EU, 'Draft Multi-annual programme for an area of Freedom, Security and Justice serving the citizen (The Stockholm Programme)', Brussels, 16 October 2009, document No. 14449/09, JAI 679, p. 9, point 2.4.

<sup>12</sup> Ibid., pp. 4-5.

a 'Europe of rights', which was later on reiterated by the European Council Conclusions of December 2009.<sup>13</sup>

It is here, in relation with such promotion of citizens' rights across Europe, where a future common policy dedicated to the rights of individuals in criminal proceedings has been envisaged by the Stockholm Programme. The latter states: "the protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union ... in order to maintain mutual trust between the Member States and public confidence in the European Union".<sup>14</sup> In this context, the Roadmap for strengthening procedural rights in all criminal cases across the EU has become a key component of the Stockholm Programme, which invites the Commission to enact concrete legislative proposals for assuring the implementation of the measures contemplated therein.

It must be recognised that the protection of the rights of suspected and accused persons in criminal proceedings has been one of the Chapters inside the Stockholm Programme where more progress has been achieved during the negotiations inside the Council's rooms. In particular, the last version of the Programme is particularly demanding as regards the implementation of specific proposals foreseen inside the Roadmap.<sup>15</sup> Also a new addition has been made in order to extend the list of procedural rights contemplated in today's Roadmap. Indeed, the European Council invites the Commission also to "assess whether other issues (would be necessary)... to promote better cooperation in this area", with explicit reference to the presumption of innocence.<sup>16</sup> Finally, we can also see in the final version of the Stockholm Programme the introduction of a new chapter on detention, where the Council calls upon the Commission to reflect about initiatives to promote the exchange of 'best practices' where the procedural rights of detainees should be also included.<sup>17</sup> It therefore appears that the Council has taken on board some of the policy priorities put forward by the European Parliament in the field of criminal justice in its Resolution of 25 November 2009.<sup>18</sup>

The debate about the protection of procedural rights in criminal proceedings is clearly not new at EU level. A previous Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (henceforth, the FWD Proposal)

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<sup>13</sup> Brussels, "The Stockholm Programme – An open and secure Europe serving and protecting the citizens", document No. 17024/09, DO EUR 3, JAI 896, POLGEN 229.

<sup>14</sup> Ibid., point 2.4.

<sup>15</sup> Presidency of the Council of the EU, Draft Multi-annual programme for an area of Freedom, Security and Justice serving the citizen (The Stockholm Programme), op. cit., p. 9, point 2.4., which explicitly declares "the European Council invites the Commission to come forward with *appropriate proposals* for its swift implementation, on the conditions laid down therein" (italics belong to the author).

<sup>16</sup> At the moment only a Green Paper has been presented by the Commission; see European Commission (2006), Green Paper on the presumption of innocence, COM 2006 (174) final, 26.4.2006.

<sup>17</sup> See point 3.2.6. This chapter was already included in previous versions; see Presidency of the Council of the EU, "The Stockholm Programme – An open and secure Europe serving and protecting the citizens", Brussels, 25 November 2009, document No. 16484/09, REV 1, JAI 866.

<sup>18</sup> European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, P7\_TA-PROV (2009) 0090, point 112 and further version on 18 November 2009, B7 0155/2009 retrieved at official website <http://www.europarl.europa.eu/RegWeb/application/registre/simpleSearch.faces> (last access on 14 December 2009).

had been presented by the European Commission on 28 April 2004.<sup>19</sup> However, after the initial work carried out by the Commission and the amendments proposed by the European Parliament, the initiative was never adopted by the Council. After years in the Council's hands, where arduous negotiations took place, a much lighter 'counter-proposal' was set out and further revised versions surfaced during the Austrian, Finnish and German Presidencies of the European Council in 2006 and 2007.<sup>20</sup> The failure of this initiative was mainly due to the hard opposition expressed by certain EU Member States' delegations – namely the UK, the Czech Republic, Ireland, Malta and Slovakia – which considered that the protection of procedural rights was already laid down in Arts. 5 and 6 of the ECHR and that this protection should be considered sufficient.

As a result of the failure experienced by the previous proposal and in an attempt to pursue the policy objective to establish a common European legislation contemplating a shared catalogue of procedural safeguards for suspects and defendants in criminal proceedings as part of the 'due process of law', the strategy advocated at EU level has therefore been to proceed separately (a sector-by-sector approach) starting with the regulation of specific procedural rights where wider agreement exists between EU member state delegations. In this case, the first turn has been taken by the right to interpretation and translation, where a new proposal for a Council Framework Decision was presented in July 2009,<sup>21</sup> and which is currently under negotiation inside the European Parliament and Council, now under the form of initiative of Directive due to Lisbon Treaty amendments.<sup>22</sup>

The fate of this and other related initiatives on the topic of procedural rights will be surely different since the entry into force of the Treaty of Lisbon on 1 December 2009. The latter offers a clear legal base in Art. 82 (2) Treaty on the Functioning of the European Union (TFUE) and therefore renders the argument claiming the inadequacy of the legal basis put forward by certain national delegations no longer sustainable.<sup>23</sup> Art. 82 (2) TFUE expressly declares that "the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules ... They shall concern: b) the rights of individuals in criminal procedure". According to this text, any European regulation covering this topic is contemplated as *minimum standards* and, obviously, member states will

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<sup>19</sup> COM (2004) 328 final, Brussels, 28.4.2004. See also Green Paper from the Commission 'Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union', Brussels, 19.2.2003, COM (2003) 75 final.

<sup>20</sup> See M. Jimeno-Bulnes (2008), "The Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union", in E. Guild and F. Geyer (eds), *Security versus Justice? Police and judicial cooperation in the European Union*, Aldershot/Burlington: Ashgate, pp. 171-202; also F. Irurzun Montoro (2007), "Negotiating the Framework Decision on procedural safeguards in the European Council", in C. Arangüena Fanego (ed.), *Procedural safeguards in criminal proceedings throughout the European Union*, Valladolid: Lex Nova, pp. 25-45.

<sup>21</sup> Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings, COM (2009) 338 final, 8.7.2009.

<sup>22</sup> Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings; at the time of writing last version is presented in Brussels, 22 January 2010, document No. PE-CONS 1/10, DROIEN 6, COPEN 22, CODEC 41 available at Council of EU's official website above indicated. See also Explanatory memorandum in document No. 5673/10, DROIEN 8, COPEN 25, CODEC 47.

<sup>23</sup> Also R. Löof (2006), "Shooting from the hip: Proposed minimum rights in criminal proceedings throughout the EU", *European Law Journal*, Vol. 12, No. 3, pp. 422-30, as well as C. Arangüena Fanego (2008), "Procedural guarantees of suspects and defendants", in M. de Hoyos Sancho (ed.), *Criminal proceedings in the European Union: Essential safeguards*, Valladolid: Lex Nova, pp. 131-162.

remain free to introduce higher protection standards for such rights of individuals.<sup>24</sup> It is also important to point out that for first time constitutional rules in EU call for the enactment of a legal framework covering Criminal Procedural Law as a sort of ‘harmonisation’ (now approximation)<sup>25</sup> in parallel to traditional judicial cooperation.<sup>26</sup> This situation needs to be welcomed as long as the defence of procedural rights constitutes an indispensable component of existing and any future security measures at EU level.<sup>27</sup>

Prior to the adoption of the Lisbon Treaty, there have been enormous discussions inside the Council about the necessity and added value at times of providing a catalogue of procedural rights at EU level taking into account the framework of protection already provided in ECHR. It is well known that this argument has been advocated by certain member states in order to avoid any kind of transnational regulation in this field, which justified the failure of the former 2004 Commission proposal and persisted until today. That notwithstanding, a new perspective on procedural rights is necessary within the EU’s AFSJ as a whole<sup>28</sup> and as complementary component to the increasing development of European judicial cooperation in criminal matters. The development of an EU legal setting on the protection of procedural rights in criminal matters is the only way forward for the EU to properly meet the challenge to respect fundamental rights and freedoms of individuals and guarantee justice, and in order to ensure that

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<sup>24</sup> See also S. Peers (2008), “EU Criminal Law and the Treaty of Lisbon”, *European Law Review*, Vol. 33, No. 4, pp. 507-529, p. 513.

<sup>25</sup> Concept already used by the literature before the Lisbon Treaty; see for example A. Weyembergh (2005), “Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme”, *Common Market Law Review*, Vol. 42, No. 6, pp. 1567-1597.

<sup>26</sup> Approximation can even have an enhanced position in relation to traditional mutual recognition in new regulation according to some literature; see E. Guild and F. Geyer (2009), “Introduction: The search for EU Criminal Law – Where is it headed?”, in E. Guild and F. Geyer, op. cit., pp. 1-16, at p.12. Conversely, other authors consider the approximation not as an aim in itself but as a tool of the aim of mutual recognition as much as it is only contemplated in order to ‘facilitate’ the latter according to explicit text provided in Art. 82 (2) TFUE; see for example S. De Biolley and A. Weyembergh (2008), “Le traité de Lisbonne et la fin annoncée du troisième pilier: sortie de crise pour l’espace pénal européen?”, in P. Magnette and A. Weyembergh (eds), *L’Union européenne: la fin d’une crise?*, Bruxelles: Editions de l’Université de Bruxelles, pp. 201-218, p. 213, as well as E. Herlin-Karnell (2009), “Waiting for Lisbon ... Constitutional reflections on the embryonic general part or EU Criminal Law”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 17, No. 3, pp.227-242, p. 230.

<sup>27</sup> The same position was supported several years ago; see M. Jimeno-Bulnes (2004), “After September 11<sup>th</sup>: The fight against terrorism in national and European law. Substantive and procedural rules: some examples”, op. cit., p. 252. As has also been pointed out: “it is simply a matter of a symmetrical imperative: no system of criminal justice, at whatever stage in its development, is complete without addressing the issue of procedural safeguards”; see M. Fletcher and R. Löf with B. Gillmore (2008), *EU Criminal Law and Justice*, Cheltenham & Northampton: Edward Elgar, p. 50. In this context and as another example in the literature see also E. Baker (2009), “From past imperfect to future perfect? A longitudinal study of the Third Pillar”, *European Law Review*, Vol. 34, No. 1, pp. 25-54, p. 34 and V. Mitsilegas (2009), *EU Criminal Law*, Oxford and Portland: Hart Publishing, p. 31 and ff. under the title ‘the politics of the third pillar: member states’ security ambition versus institutional checks and limits’. Also in previous times by J. Apap and S. Carrera (2004), “Progress and obstacles in the Area of Justice and Home Affairs: An overview”, in J. Apap (ed.), *Justice and Home Affairs in the EU. Liberty and Security issues after enlargement*, Cheltenham and Northampton: Edward Elgar, pp. 1-24, p. 12.

<sup>28</sup> See A. Klip (2009), *European Criminal Law*, Antwerpen: Intersentia, p. 425.

approximation and mutual recognition in this area go in same direction, which is far from being always the case.<sup>29</sup>

Further, any approximation on this policy issue has a special significance because it not only implies a kind of sectoral approach as far a European regulation is provided in a specific area as it is, in this case, in the field of procedural rights but also a kind of transversal or ‘horizontal approach’.<sup>30</sup> Undoubtedly the last one would have been more efficient as much as the set of procedural safeguards contemplated will have to be enforced in all criminal proceedings to be developed in EU member states (sectoral approach) as well as in all instruments provided to facilitate judicial cooperation in criminal matters between same member states (transversal or horizontal approach).

Finally, it can be argued that now specific constitutional provisions relating some specific procedural rights are also foreseen as much as the present Art. 6 (1) TEU recognises the binding character of the Charter of Fundamental Rights of the European Union.<sup>31</sup> In this context, procedural rights such as right to an effective remedy, right to a fair trial, presumption of innocence, right of defence, *non bis in idem* and even principles like legality of proportionality are there explicated.<sup>32</sup> But only a cross-reference is done under the mentioned precept and, what is worse, its enforcement is far away to be generalised in whole Member States as far as such binding character is excepted in some Member States as it is, in concrete, UK, Poland and, last, Czech Republic.<sup>33</sup> That is the price to be paid according to the ‘flexibility’ (in fact, ‘exceptionalism’) imposed by the Treaty of Lisbon.<sup>34</sup>

### 3. An Outline of the Proposed Measures in the Council’s Roadmap

After an Explanatory Memorandum, which first refers to the ECHR and its protocols ‘as interpreted by the European Court of Human Rights’ (‘Strasbourg-proof’)<sup>35</sup> along with few comments in favour of a common European regulation on procedural rights in criminal

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<sup>29</sup> In this context, see E. Guild (2004), “Crime and the EU’s constitutional future in an area of freedom, security and justice”, *European Law Journal*, Vol. 10, No. 2, pp. 218-234.

<sup>30</sup> See V. Mitsilegas (2009), “The third wave of third pillar law: Which direction for EU criminal justice?”, *European Law Review*, Vol. 34, No. 4, pp. 523-60, p. 547.

<sup>31</sup> Original version enacted on 7 December 2000, Official Journal C 364, 18 December 2000, pp. 1-22 was adapted on 12 December 2007, Official Journal C 303, 14 December 2007, pp. 1-16. See extensively S. Peers and A. Ward (2004), *The European Union Charter of Fundamental Rights*, Oxford and Portland: Hart Publishing.

<sup>32</sup> Specifically, Arts. 47-50.

<sup>33</sup> See Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to United Kingdom and Declaration No. 53 by the Czech Republic on the Charter of Fundamental Rights of the European Union, both of them in Official Journal C 115, 9 May 2008, pp. 313-314 and pp. 355-356 respectively. Conversely, other Member States, like Spain, reproduce at the national level the whole content of this Charter to be used as ‘interpretative criterium’ related to the constitutional protection of fundamental rights; see Organic Law 1/2008, 30 July, Spanish Official Journal No. 184, 31 July 2008, pp. 32919-32925.

<sup>34</sup> In this context, see S. Carrera and F. Geyer (2008), “The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice”, in E. Guild and F. Geyer, op. cit., pp. 289-307, p. 303. Specifically related to such exceptionalism applied to the Charter of Fundamental Rights see A. Moriceau (2008), “Le Traité de Lisbonne et la Charte des droits fondamentaux”, *Revue du Marché Commun et de l’Union Européenne*, No. 519, pp. 361-364, p. 363.

<sup>35</sup> Point 13 Resolution of the Council of 30 November 2009, op. cit., although the mention of “Strasbourg-proof” included in the original roadmap’s draft has disappeared in the text of the Resolution.

matters,<sup>36</sup> the Resolution presents a set of six measures. Nevertheless, this list does not constitute a *numerus clausus* because the Council has reserved itself the option to consider the possibility of addressing the question of protection of procedural rights in matters different from those expressly listed inside the catalogue.<sup>37</sup> As an example, a first step in the area of procedural rights has been already launched through a sort of horizontal approach (and not sectoral) by amending various mutual recognition-related Framework Decisions dealing with the provisions related to *in absentia* judgments;<sup>38</sup> undoubtedly it is a big effort in the line of harmonisation (now approximation) of a common agreement by member states despite some specific failures.<sup>39</sup>

The measures now envisaged are the following:<sup>40</sup> 1) translation and interpretation; 2) information on rights and information about the charges; 3) legal aid and legal advice; 4) communication with relatives, employers and consular authorities; 5) special safeguards for suspected or accused persons who are vulnerable; and 6) a Green Paper on the right to review of the grounds for pre-trial detention.

Measure 1: Translation and interpretation. The Resolution states: “The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need and interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.”<sup>41</sup> According to the ECtHR’s interpretation of Art. 6 (3) (e) ECHR,<sup>42</sup> such right “guarantees the right of an accused to participate effectively in a criminal trial”. In general, and according to the same interpretation, “this includes, *inter alia*, not only the right to be present, but also to hear and follow the proceedings”.<sup>43</sup> Besides, linguistic assistance not only

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<sup>36</sup> E.g., “it is now time to take action to improve the balance between these measures (‘facilitate prosecution in the area of judicial and police cooperation’) and the protection of procedural rights of the individual”; see Explanatory Memorandum, point 10, *Ibid*.

<sup>37</sup> Point 12, *Ibid*. The provision “in due course” maintained in original resolution’s draft has also disappeared in final text.

<sup>38</sup> Council FWD 2009/299/JHA of 12 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA and 2008/947/JHA, thereby enhancing the procedural right of persons and fostering the application of the principle of mutual recognition to decisions rendered in the abstract of the person concerned at the trial, Official Journal L 81, 27 March 2009, pp. 24-36.

<sup>39</sup> Unfortunately the final text has eliminated the common definition of such decisions rendered *in absentia*, which contemplated custodial sentences or detention orders and was provided in the previous initiative presented by Slovenia, France, Czech Republic, Sweden, Slovakia, UK and Germany, Official Journal C 52, 26 February 2008, pp. 1-18; only a slight approach to a common definition has been introduced in the above-mentioned Art. 2 FWD concerning each FWD amended. See M. Jimeno-Bulnes (2009), “Spain and the EAW: Present status and future perspectives”, in E. Guild and L. Marin (eds), *Still not resolved? Constitutional issues of the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, pp. 261-296, p. 271.

<sup>40</sup> The order of the measures proposed seems to be only indicative as well as the ‘short explanations’ provided for every measure. The Resolution states that “the rights included in this roadmap ... could be complemented by other rights”; see Council’s Resolution in p. 2, point 2.

<sup>41</sup> Original text of this last sentence agreed on 31 July 2009 has been also amended; initial redaction was wider in order to provide ‘particular attention ... to the needs of suspects and accused with physical impairments which their ability to speak or understand the language used in the proceedings’; see document, 12531/09, *op. cit*.

<sup>42</sup> Textually, “everyone charged with a criminal offence has the following minimum rights: e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

<sup>43</sup> *Stanford v. UK*, 23 February 1994, § 26.



covers the inability to speak a language, but it also refers to acoustic abilities as it is pointed here, considering that such a specific provision is applied to “deaf suspects or people with hearing or speech impairments”, for whom “qualified and experienced sign language interpreters” must be assigned in court proceedings and in police interviews.<sup>44</sup> In this context, the new Art. 2 (1) Initiative for a Directive of European Parliament and of the Council on the rights to interpretation and to translation explicitly provides the right to interpretation “before investigative and judicial authorities, including during police questioning, during all court hearings and during any necessary interim hearings” as well as the assistance of persons with “hearing impediment”<sup>45</sup> to be respected in all criminal proceedings as well as proceedings to be delivered for the execution of a European Arrest Warrant (EAW).<sup>46</sup>

Also the right to translation of “essential procedural documents” is here included, without mention of what precisely they are. In any case, according to ECtHR jurisprudence, more restrictions are usually placed on the right to translation since the latter is limited to the translation of those documents that allow the accused “to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of events” – in short, those that need to be understood “in order to have the benefit of a fair trial”.<sup>47</sup> A more explicit provision of the documents that are considered to be “essential procedural documents” for translation is now contemplated in the mentioned Initiative for a Directive on interpretation and translation. Art. 3 (2) of this Initiative declares that “the essential documents to be translated, in whole or the important passages thereof, shall include at least detention orders or equivalent decisions depriving the person of his liberty, the charge or indictment and any judgment, where such documents exist”.<sup>48</sup> Moreover, a general clause in relation to the possibility by the suspect or his/her lawyer to “submit a reasoned request for translation of further documents, which are necessary for the effective exercise of the right of defence” extends the initial list according to Art. 3 (3) of the same Initiative for a Directive.<sup>49</sup>

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<sup>44</sup> FWD Proposal on certain procedural rights in criminal proceedings throughout the European Union, 28 April 2004, p. 14, point 64. This interpretation assistance for persons with hearing or speech impediments was also provided originally in Art. 2 (5) FWD Proposal on the right to interpretation and to translation in criminal proceedings according to the original draft enacted by Commission.

<sup>45</sup> Present initiative for a Directive mentioned above has made sensible changes in this text. Text in original FWD Proposal on the right to interpretation and to translation in criminal proceedings provided also the right to interpretation “during all necessary meetings between the suspect and his lawyer” in addition to assistance of interpretation for persons with hearing and speech impediments. Also an important provision in order to contemplate the right to interpretation “in his/her mother tongue” if possible before any other interpretation to “another language that he understands” as expressed in the original draft has been included in same Art. 2 (1).

<sup>46</sup> See Art. 1 (1) Initiative for a Directive, op. cit.

<sup>47</sup> *Kamasinski v. Austria*, 19 December 1989, § 74. The same distinction between interpretation and translation is made in *Hermi v. Italy*, 18 October 2006, especially §§ 68 and ff.

<sup>48</sup> Besides a right of appeal against a possible refusal, the translation of the above-mentioned documents is contemplated in Art. 3 (4) same Initiative for a Directive. Nevertheless, it has lost the translation of “essential documentary evidence” according to the original draft on same Art. 3 (2) FWD Proposal. Also some other amendments have taken place in the text now negotiated and for example a provision in order to offer ‘an oral translation or an oral summary of the documents referred to in this Article’ as substitutive of the right to translation of those ones has been introduced in Art. 2 (6) Initiative for a Directive and a possible waive of such right has been also included in Art. 2 (7). Both provisions seem to reduce the initial considerations provided by the Commission in favour of an extensive right of translation as interpreted by ECtHR.

<sup>49</sup> Also lost is the explicit reference to the possible translation of the “written legal advice from the suspect’s lawyer” according to the original draft provided in the same Art. 3 (3) FWD Proposal.

The proposed measure does not include any reference to the quality of interpretation and/or translation, which constitutes an important difference from the text of the original 2004 Commission proposal.<sup>50</sup> This omission is striking taking into account the importance granted by the Commission to this particular point as far as the lack of accuracy and qualified interpretation and/or translation is in a majority of cases one of the biggest problems amongst the EU member states.<sup>51</sup> Its importance has been equally emphasised by recent ECtHR jurisprudence such as in *Protopapa v. Turkey* (judgment of 6 July 2009).<sup>52</sup> The current proposal does neither include a reference to free access to both rights which was also foreseen in the 2004 FWD Proposal as well as in Art. 6 (3) (e) ECHR.<sup>53</sup> Nevertheless, it is to be welcomed that a minimum reference to both provisions has been included in the new text as regards the specific issue as it is mentioned in the Initiative for a Directive on the rights to interpretation and to translation.<sup>54</sup> In addition, a Resolution on Best Practices is currently underway.<sup>55</sup>

Measure 2: Information on rights and information about the charges. The Resolution establishes that a person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of accusation against him or her. Anyone who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, without prejudice the due course of the criminal proceedings. Both guarantees, i.e. the right to get

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<sup>50</sup> Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, op. cit., p. 10, point 37, explicitly “the profession suffers from a lack of status, with translators and interpreters sometimes being poorly paid, not having social benefits (such as paid sick leave and pension rights) and complaining that they are not consulted enough by their counterparts in the legal profession”. Also the proposal for training, accreditation and registration of both legal professions was discussed in the previous Commission’s Green Paper “Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union”, Brussels, 19.2.2003, COM (2003) 75 final, p. 29 and ff.

<sup>51</sup> See M. Jimeno-Bulnes (2008), op. cit., p. 192 and specifically M. Jimeno-Bulnes (2007), “Free access to interpretation and translation” and B. Vidal Fernández (2007), “The right to accurate interpretation and translation of a high standard: Articles 8 and 9 of the Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union”, both in C. Arangüena Fanego, op. cit., pp. 153-181 and pp. 211-229 respectively.

<sup>52</sup> Textually, according to § 80, “in view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (see *Kamasinski*, cited above, § 74)”.

<sup>53</sup> The leading case in the interpretation of ECHR rules is *Lüdicke, Belkacem and Koç v. Germany*, judgment of 28 November 1978, where the ECtHR came to the conclusion that the term ‘free/gratuitement’ means a ‘once and for all exemption or exoneration’ (§ 40). See also the more recent case *Isyar v. Bulgaria*, 20 November 2008, §§ 45 and ff.

<sup>54</sup> In concrete terms, Art. 4, which declares that “Member States shall cover the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings” as well as Art. 5 in regulation that “Member States shall take concrete measures to ensure that the interpretation and translation provided shall be of adequate quality so that the suspected or accused person, as well as a person subject to the execution of a European Arrest Warrant, is fully able to exercise his or her right”.

<sup>55</sup> Council of EU, Proposal for a Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings, Brussels, 23 October 2009, document No. 14793/09, DROIEN 133, COPEN 205.

information of basic rights orally or, where appropriate, in writing (e.g., by way of a letter of rights),<sup>56</sup> and the right to obtain information “about the nature and cause of the accusation against him or her”, have been included in the Resolution in similar terms as those provided by the former 2004 Commission FWD Proposal on procedural rights.<sup>57</sup> Although sometimes the literature<sup>58</sup> has made a distinction between the categories of ‘charge’ and ‘accusation’, both of them involve the same content in light of the answer held by the ECtHR in the case of *Lutz v. Germany*.<sup>59</sup> As regards the nature and cause of a charge or accusation, the information should be clear and correct and it should be presented in a language that the accused person understands; which, if necessary, should require the assistance of an interpreter or translator, insofar as there is an evident connection between the present right and the instrumental right of interpretation and translation.<sup>60</sup> Conversely, according to ECtHR standards,<sup>61</sup> no special formal requirement should be required as to the manner to inform the accused.

Further, following the interpretation carried by the ECtHR, the right to information should include not only facts but also legal qualifications.<sup>62</sup> However, access to the file by the individual concerned, which was mentioned in first version of the Swedish Roadmap, has disappeared in the draft Resolution as long as no jurisprudential reference by ECtHR has been carried out about this issue until present.<sup>63</sup> Any specific regulation surrounding this field should include an explanation about the meaning of ‘appropriate time’ as envisaged in the present text, considering that this information must be provided, at a minimum, before the accusation in order to provide the effectiveness of the right here contemplated. An enumeration of the content of such information should be also desirable.<sup>64</sup>

Measure 3: Legal aid and legal advice. The Resolution stipulates: “The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.” The Resolution contemplates here the general right of defence and refers

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<sup>56</sup> The final text does not make changes compared with the original Draft Resolution, but it is nevertheless different from the first roadmap text as much as in the first roadmap’s text the right to “get information on his/her basic rights in writing” was exclusively enacted.

<sup>57</sup> Art. 14; conversely, a specific provision to guarantee the provision of information about the charges was not contemplated in such FWD proposal.

<sup>58</sup> S. Trechsel (2005), *Human rights in criminal proceedings*, Oxford: Oxford University Press, p. 195.

<sup>59</sup> Judgment of 25 August 1987, where it was declared that “the Court proceeded on the basis that in using the terms ‘criminal charge’ (*accusation en matière pénale*) and ‘charged with a criminal offence’ (*accusé, accusé d’une infraction*) the three paragraphs of Article 6 referred to identical situations” (§ 52).

<sup>60</sup> See the aforementioned *Brožicek* and *Kamasinski* cases; in the first, a written translation of the accusation was required, while in the second, oral information supplied by an interpreter was enough.

<sup>61</sup> See specifically *Miroux v. France*, 26 September 2006, §§ 31 and ff.

<sup>62</sup> *Pélissier v. Sassi*, 25 March 1999, § 51. This case probably represents the most relevant jurisprudence on the matter as in this judgment it is also pointed out by the CHtHR that the right to information is part and parcel of the right to a ‘fair trial’ protected as a whole in Art. 6 (1) ECHR and is also connected with the right of the defendant to prepare his or her defence according to Art. 6 (3) (b) ECHR.

<sup>63</sup> Although it should be observed as part as the most general right of defence; in this sense see M. Chiavario (2005), “Private parties: The right of the defendant and the victim”, in M. Delmas-Marty and J.R. Spencer (eds), *European Criminal Procedures*, Cambridge: Cambridge University Press, pp. 541-593, p. 558.

<sup>64</sup> E.g., reference to the law, date and place of the fact, specification of the material fact, indication of the elements or sources of proof ...; see E. Valentini (2007), “The ‘other rights’ and the information about the charge”, in C. Arangüena Fanego, op. cit., pp. 375-379, p. 379.

to two specific procedural safeguards: first, the right to legal aid as a whole covering, among others, the costs of this legal advice and previous interpretation/translation; and second, the right to legal counsel. In this context, according to the expression “at the earliest appropriate stage” contained in the measure, the right to legal advice should be available to every suspected person as soon as possible and, in any case, before answering questions in relation to the charge at hand. This was also specifically provided in the 2004 FWD Proposal on procedural rights.<sup>65</sup> Nevertheless, offering a definition of the meaning of “earliest appropriate stage of proceedings” would be also desirable in order to properly guarantee the right to legal advice.<sup>66</sup>

In addition, and in accordance with Art. 6 (3) (c) CEDH, which operates as minimum standard in relation with the general right of defence, three different procedural rights should be here considered: first, the right to self-representation; second, the right to freely chosen legal assistance; and third, the right to obtain legal aid. First, although not expressed, the right of defend oneself in person should be allowed if it is also permitted under domestic law.<sup>67</sup> This would also include the possibility to waive the right to such legal assistance according to ECtHR jurisprudence.<sup>68</sup> Secondly, the right to a technical defence with a lawyer of one’s own choosing should also be assured, including, for instance, confidentiality of conversations between the accused and counsel.<sup>69</sup> Lastly, the right to free legal aid should be also contemplated with regard to the defendant’s economic situation in correspondence with the respective obligation on the part of the state.<sup>70</sup> Last but not least, a separate regulation for both rights – legal aid and legal advice – would be strongly recommended as much as they are completely different procedural safeguards. With such provision of legal aid as an independent right, a more extensive guarantee will take place covering not only the previous Measure 1, but also in relation to the free access to another professionals or services as they are generally provided in national legislation.<sup>71</sup>

*Measure 4: Communication with relatives, employers and consular authorities.* The Resolution provides: “A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.” According to this text, a stricter requirement is contemplated for the suspect or accused persons in those cases involving the

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<sup>65</sup> Textually, Art. 2 (1) “a suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it” and Art. 2 (2) “a suspected person has the right to receive legal advice before answering questions in relation to the charge”.

<sup>66</sup> Same opinion by C. Arangüena Fanego (2007), “The right to legal assistance in the Proposal for a Council Framework Decision relating to certain procedural rights in criminal proceedings throughout the European Union”, in C. Arangüena Fanego, op. cit., pp. 85-116, p. 155.

<sup>67</sup> That is the right to proceed *pro se* waiving the right to legal assistance; see R.J. Allen et al. (2005), *Criminal procedure: Investigation and right to counsel*, New York: Aspen Publishers, p. 215. Also discussion in ECtHR jurisprudence, e.g., *Foucher v. France*, 18 March 1997 and *Lagerblom v. Sweden*, 14 January 2003.

<sup>68</sup> Case *Foucher v. France*, Ibid., §§ 17 and ff.

<sup>69</sup> It was made clear by ECtHR in *Öcalan v. Turkey*, 12 March 2003, § 146.

<sup>70</sup> See leading cases *Artico v. Italy*, 13 May 1980, and *Pakelli v. Germany*, 25 April 1983.

<sup>71</sup> For instance, the right to free expertise, the free publication of notifications and summons in newspapers, the exemption of the payment of deposits, the access to some official copies and documents for free ... as it is contemplated in Spanish Law for Legal Aid 1/1996, 10 January.

deprivation of liberty. It must be remembered that in this particular case this guarantee is not expressed as part neither of the right to a fair trial ex Art. 6 ECHR nor even the right to liberty and security ex Art. 5 ECHR but there are international rules dedicated explicitly to regulate states' obligations in this area such as the 1963 Vienna Convention on Consular Relation (VCCR);<sup>72</sup> as well as some cases before the International Court of Justice (ICJ),<sup>73</sup> which have taken place as a consequence of the breach of this safeguard.

In relation to the enforcement of this right, the adoption of special protocols for police conduct in the EU has been proposed, which would oblige arresting officers to inform suspects taken into custody of this right and to contact the consular authorities when a foreigner is detained.<sup>74</sup> Finally, the sentence that has been included in the Resolution reading "this should not prejudice the due course of the criminal proceedings" is in our view of a rather obvious nature.

*Measure 5: Special safeguards for suspected or accused persons who are vulnerable.* The next measure highlighted by the Resolution reads as follows: "In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition." The objective of such measure would be to guarantee the fairness of the proceedings in accordance with ECHR standards. In this case a sort of definition has been added in the proposed text for Draft Resolution in comparison with the initial version of the Roadmap which only included a general clause related to "vulnerable suspects and defendants" without specifying who they were. Nevertheless, although the addition of such examples relating to some personal conditions (such as age, mental or physical health), a specific list of potentially vulnerable categories of persons will need to be mentioned in further regulation because the present text does not provide enough information. In this context the list provided in the former Commission's Green Paper could be useful,<sup>75</sup> despite its non-

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<sup>72</sup> Art. 36 (1) provides: "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison; custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (...)."

<sup>73</sup> E.g., *Beard case (Paraguay v. USA)*, Order of 9 April 1998 (case discontinued); *Lagrand case (Germany v. USA)*, judgment of 27 June 2001; *Avena case (Mexico v. USA)* judgment of 31 March 2004 ... all of them retrieved from the official website (<http://www.icj-cij.org>, menu list of all cases) But as was pointed out by same Commission in its initial Green Paper on procedural safeguards presented in 2003, apart from the fact that such a procedure entails great complexity and an extraordinary duration, a suit before this Court may only be brought by one state against another, which is considered that does not treat one of the citizens of first one in accordance with consular protocol. In sum, it is not provided a remedial action for the same individual concerned and for all these reasons the inclusion of present measure as necessary; see Green Paper from the Commission "Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union", op. cit., p. 38.

<sup>74</sup> See A. Blanco Peñalver (2007), "The rights to consular assistance and information", in C. Arangüena Fanego, op. cit., pp. 345-354, p. 350.

<sup>75</sup> E.g., foreign nationals, children, mentally and physically handicapped, pregnant women and mothers of young children (especially single mothers), illiterate persons, refugees, alcoholics and drug addicts; see Green Paper from the Commission "Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union", op. cit., p. 36. Another categories have been also suggested as persons in a situation of extreme poverty, elderly persons, migrants, prisoners, persons infected with

exhaustive character, with the addition perhaps of other categories such as those now included in the Stockholm Programme.<sup>76</sup>

Another recommendation could be made in relation to the appropriate timing for the accomplishment of this duty by the national authorities. A further legal measure would be necessary clarifying the specific moment when the competent national authorities are entitled to guarantee such right. In this context it would be desirable that the special protection provided for such categories of persons (being suspects or accused in criminal proceedings) would cover the whole period during which the person is being tried, including the investigative period, as soon as the competent authorities become knowledgeable of his or her vulnerable situation.<sup>77</sup> Finally, the provision according to which concrete measures of specific attention could be used for every singular case according to different personal conditions would be also desirable.

*Measure 6: A Green Paper on the right to review of the grounds for pre-trial detention.* The Resolution states: “The time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper.” In this case a completely new measure has been here added in comparison with the former 2004 FWD Proposal on procedural rights.<sup>78</sup> In fact the new provision follows closely Art. 5 ECHR and, according to such ECHR standards, there is for the first time an explicit reference to pre-trial criminal proceedings, which is to be welcomed. Unfortunately, an important measure has been lost from the first draft Resolution – i.e. the possibility of establishing a periodic review of the detentions is lost,<sup>79</sup> but, as far as the adoption is foreseen of a Green Paper by the Commission with examination of ‘appropriate measures’, it could be expected that any future European laws would include similar provisions.

The proposal for a measure like this one is justified because the time that a person can spend in detention before being tried in court, and even during court proceedings, varies hugely between the EU member states.<sup>80</sup> For this reason a proposal establishing the obligation for Member States to guarantee a periodic review of such pre-trial detention with the aim to abolish such differences of periods between one state to another one as it was initially provided and it is expected to be again included in the proposed Green Paper. It is doubtful whether a common

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HIV/Aids ...; see J. Delgado Martín (2007), “Legal protection for vulnerable persons”, in C. Arangüena Fanego, op. cit., pp. 271-283, p. 278.

<sup>76</sup> See chapter dedicated to vulnerable groups with reference to the Roma community, women victims of violence or of genital mutilation ...; text agreed on 2 December 2009, op. cit., p. 16, point 2.3.3.

<sup>77</sup> M. De Hoyos Sancho (2007), “The rights of suspected persons in need of specific attention during criminal proceedings”, in C. Arangüena Fanego, op. cit., pp. 285-312, p. 292.

<sup>78</sup> As known “Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union” presented by the European Commission on 28 April 2004, op. cit.

<sup>79</sup> See initial roadmap text in document No.11457/09, op. cit., p. 6, as well as first Draft Resolution, document No. 12531, op. cit., p. 8; this amendment, as other ones concerning only translation of the text, derives from document No. 15434/09, op. cit., p. 4.

<sup>80</sup> For a comparative analysis between domestic legislation on criminal proceedings in some European countries, see M. Delmas-Marty and J.R. Spencer (eds), *European Criminal Procedures*, op. cit. or R. Vogler and B. Huber (eds) (2008), *Criminal procedure in Europe*, Berlin: Dunkler & Humblot; also specifically on the pre-trial period, see E. Cape et al. (2007), *Suspects in Europe. Procedural rights at the investigative stage of the criminal process in the European Union*, Antwerpen: Intersentia.

agreement will be reached in relation to this issue because some EU member states' representatives asked during the negotiations to delete this measure from the Roadmap.<sup>81</sup> Precisely for this reason, the Explanatory Memorandum of the Resolution includes the expression "consider presenting" in relation to the presentation of the Green Paper on this topic by the Commission.<sup>82</sup>

Nevertheless an important enforcement of any further regulation on this topic derives from the Stockholm Programme.<sup>83</sup> The Programme contemplates a specific chapter on detention measures where it states: "the European Council considers that efforts should be undertaken to strengthen mutual trust and render more efficient the principle of mutual recognition in the area of detention" as well as specific ones: "efforts to promote the exchange of best practices should be pursued and implementation of the European Prison Rules approved by the Council of Europe, supported".<sup>84</sup> In fact, as stated above, this possibility is now offered in the new provisions contained in the Lisbon Treaty.<sup>85</sup>

#### 4. Conclusions and Policy Recommendations

Among all the proposed measures envisaged by the Council Resolution in question, only one Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings has been presented so far (in July 2009) and is now derived in the Initiative for a Directive of European Parliament and of the Council on the rights to interpretation and to translation. It is disappointing that some important references that had been included in the former 2004 FWD Proposal on procedural rights have been lost in the new text, such as those related to the accuracy of the translation and interpretation, which would have obliged EU member states to ensure that translators and interpreters employed are "sufficiently qualified to provide accurate translation and interpretation" as well as to guarantee the replacement of interpreters or translators in addition to the recording of the proceedings.<sup>86</sup> The references included in the current initiative as regards the quality of interpretation and translation only contemplates the obligation by member states to "take concrete measures to ensure that the interpretation and translation provided shall be of adequate quality so that the suspected or accused person, as well as a person subject to the execution of a European Arrest

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<sup>81</sup> See Draft Resolution text of 31 July 2009, document No. 12531/09, op. cit., p. 8.

<sup>82</sup> See point 3, which reads: "the Commission is invited to submit proposals regarding the measures set out in the Roadmap, and to consider pre-sending the Green Paper mentioned under point F."

<sup>83</sup> This chapter was included as a new one in the text negotiated on 25 November 2009, document No. 16484/09, op. cit., p. 29; neither the initial Communication from the Commission to the European Parliament and the Council "An area of freedom, security and justice serving the citizen" nor other texts of the Council of EU as it is that one negotiated on 16 October 2009, document No. 14449/09, included such reference.

<sup>84</sup> "The Stockholm Programme – An open and secure Europe serving and protecting the citizens", document 17024/09, op. cit., p. 28. See Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, available at the Council of Europe's official website (<http://www.coe.int>) (Menu Committee of ministers, adopted texts, recommendations).

<sup>85</sup> Art. 82 (2) TFEU. In concrete terms, such regulation could be perfectly based on Art. 82 (2) (b) TFEU in provision of further regulation on the rights of individuals in criminal procedure according to ECHR standards; Art. 5 ECHR specifically regulates the right to liberty and security, which only can be excluded by cause of lawful arrest or detention.

<sup>86</sup> Arts 8 and 9 Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, op. cit.

Warrant is fully able to exercise his or her right”, which, obviously, does not imply necessary qualification of interpreters and translators.<sup>87</sup> On the other hand, a possible training offered to “judges, lawyers and other relevant court personnel” such as was provided in the original FWD Proposal<sup>88</sup> will not extend to interpreters and translators as they are not always considered in domestic practice of member states’ court personnel.<sup>89</sup> Unless new text of specific proposal on interpretation and translation includes the free access to both guarantees, interpretation and translation, which is not explicitly indicated in the present roadmap as well as explicit provision of both rights are also contemplated now for EAW proceedings.<sup>90</sup>

Another concern relating to the measures contained in the Roadmap elaborated by the Swedish Presidency of the EU is the silence about the precise moment when they should be guaranteed by national authorities. In particular, neither the Explanatory Memorandum nor the different measures contemplated make a single reference about the procedural stages at which each right contained in the different measures should be protected and, the extent to which such procedural guarantees should be required only at the trial in order to preserve the general right to a fair trial according to Art. 6 ECHR, or if their protection should already start in pre-trial proceedings or in investigative periods (e.g. police detention), according to Art. 5 ECHR. As is stated in the Roadmap, the purpose is to maintain ‘Strasbourg-proof’. For this reason it is desirable to protect all procedural rights not only during the trial but also during the investigative stage and, exactly, since any sort of criminal imputation or charge alleged against the person is now converted to suspect (e.g. police detention or first questioning either in the police station or elsewhere) until the time when the criminal proceeding is definitively closed with a *res iudicata* judgment (e.g.

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<sup>87</sup> In fact qualification is now contemplated in the so-called ‘Resolution on Best Practices’: “Member States should strive for a high level of qualification for interpreters and translators employed in criminal proceedings for the purpose of having an adequate standard of interpretation and translation in order to ensure the fairness of proceedings”; see Proposal for a Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings, op. cit., point 5. For this reason the idea to incorporate a European Master in Translation (EMT) was developed by the European Commission’s Directorate-General for Translation (DGT); see final version of the document “European’s Master in Translation Strategy” of 1 September 2009 ([http://ec.europa.eu/dgs/translation/programmes/emt/index\\_en.htm](http://ec.europa.eu/dgs/translation/programmes/emt/index_en.htm)).

<sup>88</sup> Art. 5 (2) FWD Proposal on the right to interpretation and to translation in criminal proceedings, specifies: “Member States shall offer training to judges, lawyers and other relevant court personnel in order to ensure the suspect’s ability to understand the proceedings.”

<sup>89</sup> See specific comments in Spain by A. Palomo del Arco (2007), “The right to the assistance of an interpreter and to the translation of documents in criminal proceedings: A preliminary approach to its content in the Spanish legal system”, in C. Arangüena Fanego (ed.), op. cit., pp. 183-209, p. 197, with a description of different conditions of the recruitment of such professionals in Spanish courts varying from being attached as court personnel, contracted by the entire translation-interpretation service to a private firm and the absolute absence of such personnel for these administrative posts in other cases; also J.M. Ortega Hérnandez et al. (2007), “Court interpreters in Spain faced with the Proposal for a Council Framework Decision on procedural rights in criminal proceedings throughout the European Union”, in C. Arangüena Fanego (ed.), op. cit., pp. 249-267, p. 259 and ff, elaborating on the division between permanent staff, temporary staff and freelance translators.

<sup>90</sup> Some national EAW implementation has not transmitted any provision in respect of the right to an interpreter and only refers to the right to legal counsel; that is the case for instance of Finnish and Maltese EAW. See M. Jimeno-Bulnes (2007), “The enforcement of the European Arrest Warrant: A comparison between Spain and the UK”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 14, Nos. 3-4, pp. 263-307, p. 292 and ff.



appeal, cassation, defence appeal ...).<sup>91</sup> The best solution, as was contemplated in the former FWD Proposal on procedural rights, would be to provide information to the suspected person of his/her rights in writing through a sort of Letter of Rights to be offered in all police stations in an understandable language.<sup>92</sup>

Some other considerations can be added. First, in relation to the formal perspectives provided in the new regulation, the new strategy of the European Commission to make separate laws for each procedural guarantee included in the present roadmap can be deemed to be comprehensive in light of the previous failure of a common agreement between member states in order to adopt a horizontal measure covering the whole set of them. However, it must also be taken into account that some procedural rights need to have a complementary regulation with each other and special status is acquired by the right to legal advice.<sup>93</sup> Further, the creation of a non-exhaustive list of procedural rights should be welcomed because other measures different from those ones proposed can also be included in the long term, for example, the case of the right to remain silent and the right of *habeas corpus*.<sup>94</sup> Both form part of the common constitutional tradition of member states and are also included in international texts.<sup>95</sup>

The Stockholm Programme approved by the European Council on 10-11 December 2009, has included an explicit reference to procedural rights. It declares: “the protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the European Union.” For this reason, “the European Council therefore welcomes the adoption by the Council of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, which will strengthen the rights of the individual in criminal proceedings when fully implemented’ and, as last statement, ‘this Roadmap will henceforth form part of the Stockholm Programme’.”<sup>96</sup> The European Council therefore has given a clear call to the European Commission to implement the foreseen proposed measures as well as other ones in the field of procedural rights.

The European institutions are concerned about the need to proceed with an evaluation of the implementation of the instruments adopted within the AFSJ in order to ensure the effectiveness of its application by the EU member states in their respective national arenas.<sup>97</sup> Besides, this

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<sup>91</sup> In accordance with S. Allegrezza (2007), “Formal aspects of the letter of rights”, in C. Arangüena Fanego (ed.), op. cit., pp. 367-373, p. 370 and ff.

<sup>92</sup> Art. 14. On the issue see F. Sommovigo (2007), “Minimum content and structure of the letter of rights”, in C. Arangüena Fanego (ed.), op. cit., pp. 381-394.

<sup>93</sup> As it has been pointed, “neither of these initial measures addressing the right to interpretation, translation or information about rights is of any use if the individual concerned does not have a lawyer to explain and challenge the legal ramifications of the information being disclosed to them”; see “Joint position on procedural safeguards” by JUSTICE et al., op. cit., p. 4, point 16.

<sup>94</sup> See G. Illuminati (2007), “The letter of rights: The lack of guarantees in the European approach to a common criminal justice system”, in C. Arangüena Fanego (ed.), op. cit., pp. 361-365, p. 364. In relation with the rights to be informed in such letter of rights, other further rights could be contemplated, such as the right to information on the possibility of carrying out investigations on behalf of the defence or the right to introduce evidence to the proceedings.

<sup>95</sup> Art. 14 (3) (g) International Covenant on Civil and Political Rights and Art. 5 (4) ECHR, respectively.

<sup>96</sup> Council of the EU, “The Stockholm Programme – An open and secure Europe serving and protecting the citizens”, op. cit., p. 17, point 2.4.

<sup>97</sup> See European Parliament Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – “The Stockholm Programme: An area of freedom, security and justice serving the citizens”, op. cit., p. 6, point 13, where there is the call for “the establishment of a concrete monitoring and evaluation system, notably in the area of justice, which

monitoring policy is now explicitly contemplated inside the Lisbon Treaty<sup>98</sup> and for this reason is also included in the Stockholm Programme in order to remind the member states of the obligation to undertake in cooperation with the Commission “an objective and impartial evaluation of the implementation of the policies in the (present) area, in particular to promote the full application of the principle of mutual recognition”.<sup>99</sup> Some other considerations concern such issues as the recommendation to avoid duplication as well as the need to create an “efficient system of follow-up to such evaluations”.

In light of the above, the following policy recommendations are made:

- 1) Any further EU legislation related to procedural rights in criminal proceedings should be adopted providing as minimum standards protection of ‘due process of law’ as foreseen in the context of the ECHR and ECtHR for every singular procedural safeguard. Indeed, matters such as the ‘quality of justice’ have huge repercussions over the principle of mutual recognition of criminal decisions and, more generally, over the levels of trust and confidence between EU member states.<sup>100</sup>
- 2) More and better specification of such procedural guarantees should be made in relation to the time period when every procedural right should be enforced; no mention is made either to the trial period or to the pre-trial or investigative period by the Roadmap. According to ECHR standards, ex Arts 5 and 6, protection of procedural rights in the investigative period should also be included and, more exactly, such protection should cover the period from the time the criminal imputation or charge is alleged until the criminal proceeding is definitively finished with a *res iudicata* judgment.
- 3) An isolated or sectoral legislative framework covering separately every procedural right according to European Commission’s new strategy should not imply a reduction of the former level of content and protection provided by the previous FWD Proposal launched in 2004. That is the case, however, in the Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings enacted in 2009, which does not include the initial references to the accuracy of the translation and interpretation.
- 4) The guarantees that had been explicitly included in the former FWD Proposal on procedural rights should be reintroduced. This is the case for instance as regards the obligation by EU member states to provide any kind of information to suspected person of his or her rights in writing through a sort of Letter of Rights to be offered in all police stations in an understandable language. Also other procedural rights could complement the present

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focuses on the quality, efficiency and fairness of existing legal instruments, of the administration of justice and of the protection of fundamental rights, closely involving the European Parliament and national parliaments”.

<sup>98</sup> See Art. 70 TFEU: “the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition.” In relation with this topic, see A. Weyembergh and S. De Biolley (2006), *Comment évaluer le droit pénal européen?*, Bruxelles: Editions de l’Université de Bruxelles as well as A. Weyembergh and V. Santamaría (2009), *The evaluation of European criminal law*, Bruxelles: Editions de l’Université de Bruxelles.

<sup>99</sup> Council of the EU, “The Stockholm Programme – An open and secure Europe serving and protecting the citizens”, op. cit., p. 7, point 1.2.5.

<sup>100</sup> D. Bigo, S. Carrera and E. Guild (2009), *The CHALLENGE Project: Final policy recommendations on the changing landscape of European liberty and security*, CHALLENGE Research Paper No. 16, September, CEPS, Brussels, p. 12.

Roadmap in the long term, such as the right to presumption of innocence envisaged by the Stockholm Programme and others like the right to remain silent and the right of *habeas corpus* as far as the roadmap contemplates a *numerus apertus* list of procedural rights.

- 5) Specific binding legislative instruments should be adopted for each procedural right<sup>101</sup> without exception, providing at a minimum the same level of protection as those contemplated in the present roadmap. Besides, it should be taken into account that the best guarantee of accomplishment of such European binding legislation in member states is the jurisdictional control provided by the European judicial institution itself, i.e. the new Court of Justice of the European Union, whose jurisdiction for all kinds of community processes – and especially infringement processes – <sup>102</sup> is now compulsory for all member states.
- 6) A monitoring programme at EU level<sup>103</sup> should be established in order to evaluate the development of such procedural rights' protection in EU member states. Since the new Art. 70 TFEU provides a legal basis for setting-up a new policy in this area, the Commission should submit as soon as possible a proposal to create a general and periodic evaluation mechanism based on the well-established system of peer-evaluation to be undertake by European institutions and member states together with the contribution of professionals as suggested in the Stockholm Programme. In fact, peer-evaluation mechanism has proved to be useful on the basis of previous experiences.<sup>104</sup> This evaluation mechanism in conjunction with an efficient follow-up system will surely improve national behaviour related to the application of European instruments in the field of Criminal Procedural Law, such as ones concerning procedural rights.

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<sup>101</sup> See Joint Position on procedural rights stated by JUSTICE, Amnesty International, Fair Trials International and Irish Council for Civil Liberties, op. cit., p. 3, point 10.

<sup>102</sup> Art 258 and ff TFEU. See S. Braum and A. Weyembergh (2009), *Le contrôle juridictionnel dans l'espace pénal européen*, Bruxelles: Editions de l'Université de Bruxelles.

<sup>103</sup> See E. Guild, S. Carrera and A. Faure Atger (2009), *Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, CEPS, Brussels, April, p. 10.

<sup>104</sup> The best example is the evaluation of the European Arrest Warrant by the European Commission and member states; see M. Jimeno-Bulnes (2009), "The application of the European Arrest Warrant in the European Union: A general assessment", in C. Fijnaut and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union*, Leiden: Martinus Nijhoff, forthcoming, point 2.2. Also specific reference on the topic by M.A. Gutiérrez-Zarza (2006), "Evaluation of Member States in the third pillar of the European Union. The specific case of the European Arrest Warrant", in A. Weyembergh and S. de Biolley (eds), *Comment évaluer le droit pénal européen?*, op. cit., pp. 99-113.

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